No. 95-980

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE CUSTOMER COMPANY,

Petitioner,

vs.

THE CITY OF SACRAMENTO AND
THE COUNTY OF SACRAMENTO,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this court exercise its discretionary jurisdiction to determine whether the California Supreme Court erred in holding that although a claim for damage suffered to private property as the result of efforts by law enforcement officers to enforce criminal laws may lie under the California Torts Claim Act, such damage does not constitute a 'taking' for a public purpose under the California Constitution, Article 1, Section 19.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In June 1987, the Sacramento Police Department and Sacramento County Sheriff's Department engaged in the surveillance of Christopher Nash, a suspect in a series of armed robberies. (CT 1783, 1792.) Both City and County law enforcement considered Nash armed and dangerous based on his claim that he would shoot it out with law enforcement. Law enforcement also knew of Nash's methamphetamine use and bizarre behavior, including the shooting of firearms inside houses and at people. (CT 1781, 1783, 1797.)

In the morning of June 22, 1987 law enforcement observed Nash and a female companion in a stolen vehicle. Additional units responded to a store owned by petitioner, Customer Company, which Nash and his companion had entered. (CT 1784, 1797-1798.) Law enforcement requested, by use of a public address system in a police vehicle, that all persons within the store exit immediately. The clerk and Nash's companion did so, but Nash refused to leave the store. (CT 1822, 1838-1840.) Because of the risk of armed confrontation, law enforcement elected not to enter the store and attempt to arrest Nash. Instead, the Sacramento Police Department's Special Weapons and Tactics unit (SWAT) was alerted to respond to a barricaded suspect situation. (CT 950, 1778.) The SWAT unit arrived soon thereafter. (CT 1780.)

Law enforcement evacuated the area around the store and diverted all traffic and non-essential personnel from the containment area. (CT 900, 943-944.) Nash refused to communicate with law enforcement despite repeated

attempts made via loudspeaker and telephone. (CT 908-909, 953.) Upon searching the stolen vehicle in which Nash was riding, law enforcement discovered a sawed-off shotgun between the passenger door and passenger seat and an automatic pistol on the console. (CT 1779.)

As they secured the scene, law enforcement continued attempts to establish communication with Nash in excess of one hour. It was their intent to use a trained hostage negotiator to effect Nash's voluntary removal. (CT 903-905, 952, 1778.) Nash made no response to any police attempts at communication. (CT 907-908, 952, 1778.) The commanding officer, Sacramento Police Department Lt. Mijares, concluded that the suspect would refuse any communication with police. (CT 908-909, 953.) For the safety of everyone involved and based on the facts available to him, Lt. Mijares assumed that the suspect was armed and dangerous. He decided that the use of tear gas to force Nash from the store presented the best and safest option. (CT 910-911, 919-922, 954, 957-959, 961-962.) The principal concern of Lt. Mijares was to avoid an armed confrontation in which lives could be lost. (CT 925, 932, 2027.)

Prior to the occasion in question, Lt. Mijares had been involved with between 50 and 100 incidents in which tear gas was used. (CT 922-923.) It was Lt. Mijares' experience that barricaded suspects are driven out immediately by tear gas. (CT 918-921, 954.)

Approximately two and one-half hours after Nash barricaded himself within the store, police fired tear gas canisters through the only available opening to the building, the glass doors and windows in the front of the store.

These were followed with canisters fired through the broken front store windows to the rear of the store in order to saturate the back of the store which contained the cooler area and office, where Nash could have been hiding. Officers also attempted to fire canisters into the ceiling to prevent Nash's escape from the gas in the attic. (CT 954, 1778-1779, 1786.) Police followed their initial introduction of tear gas with additional requests that Nash exit the store voluntarily. Nash did not respond. Police fired more tear gas rounds and repeated their request. (CT 921, 1786, 1787.) Again, Nash made no response.

The SWAT team fired additional tear gas to cover its approach to the store. Ten minutes later, the team entered the store and found Nash in the attic. At the time he was apprehended, Nash was burrowed under insulation material and unable to present any resistance to the police due to the effects of the tear gas. (CT 932, 954-955.)

Petitioner was required to replace the contents of the store because of exposure to the tear gas. Petitioner's expert testified that the use of even one canister of tear gas was sufficient to result in storewide contamination of the contents. (CT 2027.)

In October 1987, petitioner sued respondent and the County of Sacramento alleging numerous causes of action, including negligence and inverse condemnation under state law. Those claims did not include a cause of action for a taking without due process of law under the Fifth Amendment to the United States Constitution.

In a series of rulings, the superior court granted summary judgment in favor of respondent on all causes

of action. Petitioner appealed and the Third District Court of Appeal affirmed. Petitioner made no claim of taking under the Fifth Amendment. (*Customer Co. v. City of Sacramento* (1993) 18 Cal.App.4th 472, 478.) Petitioner's request for a rehearing was denied September 27, 1993.

Petitioner then sought, and was granted, review by the California Supreme Court solely on the inverse condemnation issue under the California Constitution. (Appendix I, p. 2.) Following oral argument, the California Supreme Court requested supplemental briefs addressing the issue of whether petitioner would be entitled to relief under the California Tort Claims Act. In its supplemental brief, petitioner expressly waived the right to relief under the Tort Claims Act. Petitioner made no attempt to raise a federal question at that time. (Appendix I, p. 2.)

In upholding the decisions of the lower courts, the California Supreme Court held that the remedies under California Tort Claims Act would be adequate to address petitioner's claim for damages had the same not been waived and that the facts of this case do not give rise to a 'taking' under the California Constitution, Article I, Section 19. (Appendix I, p. 31.)

Petitioner now attempts to seek review by this Court of a federal question which was not raised by petitioner below or decided by the California courts.

ARGUMENT

I

PETITIONER INCORRECTLY STATES THE BASIS FOR JURISDICTION OF THIS COURT

Petitioner wholly fails to show that this case presents "special and important reasons" that would justify this Court's granting its petition for Writ of Certiorari pursuant to the requirements of Supreme Court Rule 10.1. In fact, this case presents a textbook example of when this Court should not exercise its discretion to hear a case. This case was pending in the trial and appellate courts of California for approximately eight years without a federal law or question having been raised. During that eight year period of time, the case was decided by the trial court and consistently upheld by an intermediate appellate court and the California Supreme Court on the basis of state law only.

Petitioner's claim of jurisdiction is clearly misleading and incorrect. Petitioner asserts that this Court should exercise its judicial discretion to grant the Petition for Writ of Certiorari under Supreme Court Rule 10.1(c) only. Rule 10.1, in pertinent part, states that jurisdiction is proper:

> When a state court or a United States court of appeals *has decided* an important question of federal law which has not been, but should be, settled by this Court, or *has decided* a federal question in a way that conflicts with applicable decisions of this Court. (Emphasis added.)

Instead of citing to the language of Rule 10.1(c) which requires the showing that a federal law or federal

question *has been decided,* petitioner actually asserts that the decision of the California Supreme Court somehow *raises* an issue of federal law. If petitioner is permitted to do so by way of this Petition for Writ, this will be the first time that it has attempted to raise a federal law or federal question in this case. The decision of the California Supreme Court in this case clearly reflects that the issues before and decided by that court were based solely on provisions of the California Tort Claims Act and provisions of the California Constitution.

Following are quotes from the California Supreme Court decision regarding the issues before it:

> Customer sought, and was granted, review in this court solely on the inverse condemnation issue. (Appendix I, p. 2.)
>
> In its supplemental brief, Customer expressly "waived the right to relief under the Tort Claims Act." (Appendix I, p. 2.)
>
> Customer has abandoned its cause of action for negligence under the Tort Claims Act (*cite omitted*), now contending solely that it has a constitutional right to obtain recovery from the public entities under an inverse condemnation theory. As we shall explain, we conclude that the facts of this case do not support an inverse condemnation claim under the applicable provision of the California Constitution. (Appendix I, p. 8.)
>
> Customer does not base its claim upon the taking clause of the Fifth Amendment to the federal constitution, which is applicable to the states through the Fourteenth Amendment. (Appendix I, p. 8, footnote 2.)

> In the present case, Customer alleged a cause of action for negligence under the Tort Claims Act in addition to its inverse condemnation claim, but the superior court and the Court of Appeal concluded that the defendant public entities were immune from such tort liability . . . Customer did not seek review from this portion of the Court of Appeal's ruling. (Appendix I, p. 31.)

Although petitioner asserts that this case involves the 'taking' clause of the Fifth Amendment to the United States Constitution, petitioner fails to cite this Court to any portion of the record where it raised and relied on a Fifth Amendment claim or where any of the California courts decided such a claim. Petitioner misleads this Court at paragraph 1, page 5 of its petition by asserting that "The federal constitutional issue was raised by the City of Sacramento in its motion for summary judgment." (CT 623.) This statement appears to be intended to mislead this Court into believing that a claim under the Fifth Amendment to the United States Constitution was raised and decided by the state court. This assertion is absolutely false.

Perhaps realizing that this was inadequate to properly assert jurisdiction in this Court under Rule 10.1, petitioner next asserts that "The Federal question (5th Amendment) was properly placed before the California Supreme Court in the Amicus Curiae brief of The Pacific Legal Foundation." (Appendix, Ex. 3.) The Amicus Curiae brief is replete with the phrase "Fifth Amendment" in reference to that amendment containing language analogous to that of the California Constitution. However, petitioner fails to demonstrate that Amici were granted

leave to raise and tender to the court a matter not in issue. In addition, the Amicus brief is devoid of any assertion that a federal question had been properly raised in the state courts. Further, based on the excerpts above from the California Supreme Court decision, it is clear that the court gave no credence to use of the phrase "Fifth Amendment" by Amici as having properly raised a federal question. The Court made no effort to pass on a federal question. " . . . [W]hen the highest court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in the court can affirmatively show the contrary." *Exxon Corp. vs. Eagerton* (1982), 462 U.S. 176, 181, n.3. In the case at bar, petitioner has made no contrary showing. Thus, Petitioner's reliance on the analogous use of the Fifth Amendment by Amici as having properly raised a federal question is misplaced.

Next, under Rule 14(g)(i), petitioner is required to set forth in the Petition for Writ a concise statement containing the following:

1. specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised;

2. the method or manner of raising them;

3. the manner they were passed on by those courts; and

4. pertinent quotations of the specific portions of the record or summary thereof, with specific reference to

the places in the record where the matter appears, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioner has not met the specificity required by Rule 14. However, respondent has shown in this brief, with great specificity, that the federal question raised in the Petition was not timely or properly raised in the state courts.

Based upon the foregoing, petitioner has failed to meet its burden under Rules 10.1 and 14 of establishing that there are "special and important reasons" for granting the Petition and that a federal law or federal question has been timely and properly raised and has been decided by the California Supreme Court.

Accordingly, respondent respectfully submits that it would be inappropriate for this Court to exercise its discretion to assume jurisdiction of this case under Rule 10.1(c).

II

THE CALIFORNIA SUPREME COURT CORRECTLY HELD THAT DAMAGE TO PRIVATE PROPERTY RESULTING FROM LAW ENFORCEMENT OFFICERS ENFORCING CRIMINAL LAWS DOES NOT CONSTITUTE A TAKING UNDER CALIFORNIA LAW

The entire petition is based on the erroneous premise that a federal question was properly raised and decided in state court. Upon this Court's determination that this premise is faulty, no grounds exist upon which the petition should be granted.

Assuming arguendo, this Court determines that it should exercise its discretion in favor of assuming jurisdiction, the petition should nonetheless be denied because the California Supreme Court correctly determined that the facts of this case do not give rise to inverse condemnation or a 'taking' under the California Constitution.

A cause of action in inverse condemnation derives from Article 1, Section 19 of the California Constitution which provides:

> **"Eminent domain; just compensation; possession**
>
> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

Although exceptions to this rule of compensation exist, "it is important to consider first things first." (*Davidson v. City of Westminster* (1982), 32 Cal.3d 197, 201.) Since the "doctrine of inverse condemnation can be applied only where a public use has attached" it is incumbent to first identify the public use for which property is taken. (*Cothran v. San Jose Water Works*, (1962) 58 Cal.2d 608, 614; see, also *Ullery v. County of Contra Costa*, (1988) 202 Cal.App.3d 562, 568 and *Yox v. City of Whittier*, (1986) 182 Cal.App.3d 347, 352.)

Whether private property "taken for public use" within the meaning of Article 1, Section 19 of the California Constitution includes private property damaged by police officers in the course of legitimate police activity was a question of first impression before the California state courts. However, consistent with 100 years of California case law, the long-standing definition of "taking for public use" applied by California courts, and sensible public policy, the California Supreme held that such damage must fall outside the legitimate scope of Article 1, Section 19.

More specifically, the California Supreme Court, in the present case, held:

> . . . [A]n action for inverse condemnation does not lie because the efforts of the law enforcement officers to apprehend a felony suspect cannot be likened to an exercise of the power of eminent domain. This is not the case in which law enforcement officers commandeered a citizen's automobile to chase a fleeing suspect, or appropriated ammunition from a private gun shop to replenish an inadequate supply. Conceivably, such unusual actions might constitute an exercise of eminent domain, because private property would be taken for a public use. (*citation omitted.*) Nothing of this sort occurred in the present case, however. Application of the just compensation clause in the present case would mean, for example, that every time a police officer fires a weapon in the line of duty, that officer exercises the power of eminent domain over any property that the officer reasonably could foresee might be damaged as a result. (See YMCA v.

United States (1969) 395 U.S. 85, 92.) (Appendix I, 26-27.)

The California Supreme Court further held that although the government's conduct in the present case does not give rise to an inverse condemnation action under section 19, this does not necessarily mean that California law precludes a property owner, like petitioner, from recovering damages under the circumstances involved in this case. Instead, the government's potential liability for this type of conduct properly should be evaluated, as it always has been in the past, under the provisions of the Tort Claims Act. In this case, petitioner expressly waived the right to pursue potential remedies under the Tort Claims Act even after having been invited to address the issue in supplemental briefing before the California Supreme Court issued its decision. (Appendix I, p. 31.)

Thus, respondent respectfully submits these are additional grounds to denial of the Petition.

CONCLUSION

Petitioner's basis for jurisdiction, statement and argument in support of granting the petition, are riddled with innuendo and inflammatory statements regarding its versions of the facts in this case. However, the petition is completely lacking in facts or law to support the existence of jurisdiction or any basis whatsoever to support the granting of the Petition. Respondent has demonstrated that no Fifth Amendment federal question was properly raised or decided in state court and none is

properly before this court. Finally, the decision of the state court correctly interpreted to laws of the State of California as they relate to the facts of this case and that interpretation does not impact federal law.

For the foregoing reasons, respondent respectfully submits that the petition should be denied.

January 11, 1996

Respectfully submitted,

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